Supreme Court, U. S.
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In The

# Supreme Court of the United States

October Term, 1977

No. 77-865

LARRY POWELL,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Larry Powel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on November 1, 1977.

## OPINIONS BELOW

The opinion of the Court of Appeals, which is as yet unreported, appears in the appendix hereto, at pages App. 1 to App. 7. The order denying the petitioner's petition for rehearing is unreported and appears at page App. 7 of the appendix hereto.

## JURISDICTION

The opinion and judgment of the Court of Appeals was filed on November 1, 1977. The petitioner filed his petition for rehearing on November 15, 1977, and the petition for rehearing was denied on November 18, 1977 (p. App. 7). This petition for a writ of certiorari is being filed within thirty days after the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

## QUESTIONS PRESENTED

1. In a prosecution for conspiring to distribute a controlled substance, is evidence of two sales of the controlled substance from an alleged co-conspirator to the defendant sufficient to establish the existence of a conspiracy?

2. In a prosecution for conspiring to distribute a controlled substance, wherein there is evidence that an



alleged co-conspirator sold quantities of the controlled substance to the defendant on only two occasions, should the trial court, when requested by the defendant, instruct the jury that proof of the sale of the controlled substance is insufficient to prove the existence of a conspiracy, and that there must be proof of an agreement to distribute the controlled substance?

## STATUTORY PROVISIONS INVOLVED

The petitioner was charged with violation of 21 U. S. C. § 846, reading as follows:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The substantive offense alleged in the indictment is defined in 21 U. S. C. § 841 (a), reading as follows:

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> "(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> "(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

In 21 U. S. C. § 812, heroin is included in the list of controlled substances, Schedule I.

## STATEMENT OF THE CASE

The petitioner was indicted on a charge of conspiring to distribute a controlled substance, to-wit, heroin. It was alleged in the indictment that the petitioner conspired with Ike Conway, Herman Clarence Douglas and other unnamed co-conspirators. Conway and Douglas were not indicted. In the original indictment, it was alleged that the conspiracy took place between April 15, 1976 and June 15, 1976. During the course of the trial, the indictment was amended to allege that the conspiracy took place between April 15, 1976 and the end of July, 1976.

Ike Conway was the chief witness for the prosecution. He testified that the petitioner approached him in the spring of 1976 and asked Conway whether Conway could get him some heroin. Conway told the petitioner that he could get heroin for $1,000.00 an ounce.

About a week after the initial conversation, Ike Conway and the petitioner flew to Los Angeles, and Conway contacted Herman Clarence Douglas. Douglas came to the motel where Conway and the petitioner were staying, and the petitioner gave Douglas $10,000.00 in cash. No heroin was delivered to the petitioner at this time, but the petitioner later told Conway that the heroin had been delivered.

Ike Conway further testified that he and the petitioner went to Los Angeles on a second occasion and paid $20,000.00 to Herman Clarence Douglas. According to Conway, the petitioner later acknowledged to him that the heroin had been delivered.



On a third occasion, according to Conway, he and the petitioner went to Los Angeles and negotiated with Herman Clarence Douglas for a larger quantity of heroin, but they did not reach an agreement, and no heroin was purchased.

At the conclusion of the government's case, the petitioner made a motion for dismissal of the charges. The motion was overruled.

The petitioner submitted seven proposed instructions to the District Court. Requested Instruction No. 3 read as follows:

> "A conspiracy is an agreement between two or more persons to accomplish together a criminal or unlawful act. You are instructed, however, that the criminal or unlawful act must be that conspiracy charged in the indictment."

Petitioner's requested Instruction No. 7 read as follows:

> "You are instructed that in order to prove a conspiracy to distribute heroin as charged in the indictment the Government must prove more than a sale of heroin. The Government must prove and you must be satisfied beyond a reasonable doubt that the conspiracy involved an agreement to distribute the controlled substance, to-wit: heroin."

The District Judge refused to give the foregoing requested instructions.

In the instructions given by the District Court, a conspiracy was defined as follows:

> "A conspiracy is a combination of two or more persons, by concerted action, to accomplish some un-

> lawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of 'partnership in criminal purposes,' in which each member becomes the agent of every other member. The gist of the offense, is a combination or agreement to disobey, or to disregard, the law." (Instruction No. 9).

The jury returned a verdict of guilty, and the petitioner's motion for a new trial was overruled. The District Judge sentenced the petitioner to serve a term of seven years.

On appeal to the Court of Appeals for the Eighth Circuit, the petitioner raised the following issues:

1. The District Court erred in overruling the petitioner's motion for a judgment of acquittal.

2. The District Court erred in refusing to instruct the jury that proof of a sale of heroin is not sufficient to establish a conspiracy to distribute heroin.

3. The District Court erred in refusing to instruct the jury that a conspiracy requires an agreement between two or more persons to accomplish together a criminal or unlawful act.

The Court of Appeals affirmed the judgment of the District Court.



## REASONS FOR GRANTING THE WRIT

### I. The Concept of Conspiracy in Federal Criminal Law Is Confused and Ambiguous.

As we have pointed out above, the petitioner requested an instruction defining a conspiracy as "an agreement between two or more persons to accomplish together a criminal or unlawful act." The District Court refused to give the requested instruction. Instead, the court instructed the jury that a conspiracy is "a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means."

The instruction requested by the petitioner was in harmony with the holding of this Court in the case of *Iannelli v. United States*, 420 U. S. 770 (1975), wherein this Court said:

> "Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes. Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act. . . ."

In a footnote, this Court added the following:

> "The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case. . . . In some cases reliance on such evidence perhaps has tended to obscure the basic fact that the agreement is the essential evil at which the crime of conspiracy is directed. See Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 933-934 (1959). Nonetheless, agreement remains the essential element of the crime, and serves to distinguish conspiracy from aid-

ing and abetting which, although often based on agreement, does not require proof of that fact, see Pereira v. United States, 347 U. S. 1, 11, 98 L. Ed. 435, 74 S. Ct. 358 (1954), and from other substantive offenses as well. Id., at 11-12, 98 L. Ed. 435."

In the law review note to which Mr. Justice Powell referred in the foregoing quotation, the author commented as follows:

"The basic principle that a conspiracy is not established without proof of an agreement has been weakened, or at least obscured, by three factors. The first is the courts' unfortunate tendency to overemphasize a rule of evidence at the expense of a rule of law. Conspiracy is by nature a clandestine offense. It is improbable that the parties will enter into their illegal agreement openly; it is not necessary, in fact, that all the parties ever have direct contact with one another, or know one another's identity, or even communicate verbally their intention to agree. It is therefore unlikely that the prosecution will be able to prove the formation of the agreement by direct evidence, and the jury must usually infer its existence from the clear co-operation among the parties. But in their zeal to emphasize that the agreement need not be proved directly, the courts sometimes neglect to say that it need be proved at all. The second factor tending to undermine the strict rule that agreement must be proved is the existence of what are perhaps more liberal requirements in antitrust cases, which, although they may be justified in that area, are ever likely to be extended to the general law of conspiracy.

"The third, and perhaps the most important factor is another result of the verbal ambiguity which leads courts to deal with the crime of conspiracy as though it were a group rather than an act. . . ." 72 Harv. L. Rev. 933-934.



In the present case, we think it is fair to say that there is no direct evidence of an agreement to distribute a controlled substance. Under the instructions given by the District Court, however, it was not made clear to the jury that there had to be proof of such an agreement. In large part, the instructions given by the District Court reflect the vagueness and ambiguity of the prevailing concept of conspiracy. This area of the law is one in which some clarification is definitely overdue.

The confusion prevalent in the law of conspiracy is reflected in the opinion rendered by the Court of Appeals in the present case. After referring to the two occasions on which the petitioner purchased heroin, the Court of Appeals said:

". . . In addition to the volume of heroin purchased there is other direct evidence that appellant conspired with either or both Ike Conway and Douglas in procuring the heroin for distribution in Omaha, all as previously described in the facts surrounding the three trips to Los Angeles and returns to Omaha."

In the foregoing quotation, the word "conspired" is used in a highly confusing sense. The court clearly does not mean that the petitioner agreed with Conway and Douglas to procure heroin. It is possible that the court means merely that the petitioner dealt with Conway and Douglas in procuring heroin. However, if the sentence is given this meaning, it has almost no legal significance. We think it is clear that the Court of Appeals used the word "conspired" very loosely.

## II. The Decision of the Court of Appeals for the Eighth Circuit Conflicts With Decisions in the Second, Fifth, Seventh and Ninth Circuits.

At the conclusion of the government's case, the petitioner made a motion for dismissal of the charges. After that motion was overruled, the petitioner requested an instruction to the effect that proof of a sale of heroin was not sufficient to prove a conspiracy to distribute heroin. The Court of Appeals summarily rejected the petitioner's argument in support of the requested instruction.

In the course of its opinion, the Court of Appeals stated the following:

> "Proof of an explicit agreement to distribute the drugs is not required. The nature of the sales in itself may be sufficient evidence to support a finding of conspiracy. In *Direct Sales Co. v. United States*, 319 U. S. 703 (1943), the Supreme Court held that the nature of the goods sold, morphine sulphate, a restricted commodity with inherent capacity for harm, plus the quantity and frequency of sales was sufficient from which to infer that the seller knew of and participated in promoting the buyer's intended illegal distribution thereof. *Compare United States v. Falcone*, 311 U. S. 205 (1940)."

The significance attributed to the *Direct Sales* case by the Court of Appeals is completely contrary to the holding of the Court of Appeals for the Ninth Circuit in the case of *United States v. Spanos*, 462 F. 2d 1012 (9th Cir. 1972). In *Spanos*, the defendant was accused of conspiring with Rodney Godwin to sell stimulant drugs and to possess stimulant drugs for the purpose of sale. The evidence was that, prior to October, 1969, Godwin



had known the defendant, Spanos, for about a year and a half, during which time Godwin had been buying pills from Spanos. The conspiracy allegedly commenced in October, 1969, at which time Godwin bought 50,000 amphetamine tablets from Spanos. During the month of November, 1969, Godwin went to Spanos on two occasions and attempted to purchase more amphetamine tablets. On each of these occasions, no sale took place. On a third occasion, Godwin telephoned Spanos and asked him if he was going to do any business, and Spanos apparently put him off.

The Court of Appeals for the Ninth Circuit held that the evidence did not make out even a *prima facie* case of conspiracy. With respect to the *Direct Sales* case, the Court of Appeals for the Ninth Circuit said:

> "This case also falls within the principles laid down by the Supreme Court in Direct Sales Co. v. United States, 1943, 319 U. S. 703, 63 S. Ct. 1265, 1269, 87 L. Ed. 1674. There, on evidence far stronger than in this case, the Court found that the conspiracy had been proved, but in doing so it laid down careful limitations on the conspiracy doctrine:
>
> > "'There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy.' [*Id.* at 712.]
>
> "In a footnote to this passage the Court also stated:
>
> > "'This may be true, for instance, of single or casual transactions, not amounting to a course

> of business, regular, sustained, and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase." [*Id.* fn. 8.]

"The foregoing is a good description of what the evidence *aliunde* shows here. There is no doubt that the government could have charged Spanos with the October sale, but it did not. The government did not prove, even *prima facie,* what it charged; we cannot sustain the conviction because the government proved what it did not charge."

There is no essential difference between the evidence in *Spanos* and the evidence in the present case. The only significant difference lies in the divergent application of the *Direct Sales* case as a precedent.

The Court of Appeals for the Fifth Circuit has recognized that there are two divergent lines of authority as to whether evidence of the sale of drugs or other contraband is sufficient to prove a conspiracy. In the case of *United States v. Apollo,* 476 F. 2d 156 (5th Cir. 1973), the court referred to its own holding, in a prior case, that, in the absence of an agreement to advance a joint interest, any purchases and sales would normally not constitute conspiratorial activity. *United States v. Cook,* 461 F. 2d 906 (5th Cir. 1972). The court further noted that



there were a number of conflicting authorities on this issue.

One of the cases cited in *United States v. Apollo, supra,* was *United States v. Koch,* 113 F. 2d 982 (2nd Cir. 1940), in which the defendant was charged with having conspired to violate the statutes relating to narcotic drugs. The evidence was that the defendant agreed to purchase a quantity of cocaine from one Mauro, that the defendant sent one Al Kobach to pick up the cocaine, that the defendant later returned part of the cocaine to Mauro, and that the defendant paid Mauro for the cocaine which he did not return. The Court of Appeals for the Second Circuit held that this evidence was insufficient to prove that the defendant had conspired with Mauro and his associates. The court said:

> "The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators. Dickerson v. United States, 8 Cir., 18 F. 2d 887. It was necessary to the government's case to show that the appellant was in some way knowingly associated in the unlawful common enterprise to import the drugs and dispose of them unlawfully. . . ."

A similar ruling was made by the Court of Appeals for the Second Circuit in the case of *United States v. Aviles,* 274 F. 2d 179 (2nd Cir. 1960).

Another case cited in *United States v. Apollo, supra,* was *United States v. Ford,* 324 F. 2d 950 (7th Cir. 1963).

in which three defendants were charged with conspiring to receive, conceal, sell, barter or dispose of stolen goods. The evidence against the defendant Ford was that he went to the home of one of the other defendants and there took possession of a number of rings and watches for the purpose of having them appraised, that he subsequently returned the rings and purchased a wrist watch. The Court of Appeals for the Seventh Circuit held that this evidence was insufficient to sustain the conviction. The court said:

> ". . . Ford's actual purchase of one of the watches did not involve him in a conspiracy with Allison and Drake. The relationship of buyer and seller absent any prior or contemporaneous understanding beyond a mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property, although both parties know of the stolen character of the goods. In such circumstance, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective."

Another case in point from the Seventh Circuit is *United States v. Varelli*, 407 F. 2d 735 (7th Cir. 1969).

## CONCLUSION

This case presents to the Court an opportunity to clarify a subject on which there is great confusion and much conflict between the circuits. The confusion has previously been recognized by this Court in the case of *Iannelli v. United States*, 420 U. S. 770 (1975), and the conflict between the circuits is most apparent in the differing interpretation of this Court's opinion in the case of *Direct Sales Co. v. United States*, 319 U. S. 703 (1943).



On behalf of the petitioner, as an individual, we would add that it is very unfair to the defendant in a criminal case to be confronted with a body of law which is so confused and uncertain as the federal cases relative to alleged conspiracies involving the relationship of buyer and seller.

Respectfully submitted,

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**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1453

United States of America,

*Appellee,*

vs.

Larry Powell,

*Appellant.*

Appeal from the United States District Court
for the District of Nebraska

Submitted: September 15, 1977

Filed: November 1, 1977

Before VAN OOSTERHOUT and MATTHES, Senior Circuit Judges, and STEPHENSON, Circuit Judge.

STEPHENSON, Circuit Judge.

Appellant Powell appeals from his jury conviction on a one count indictment charging conspiracy to distribute heroin in violation of 21 U. S. C. § 846.[1] Appellant contends the trial court erred in (1) overruling appellant's motion for judgment of acquittal because the evidence was insufficient to establish a conspiracy; (2) refusing to give requested instructions regarding the conspiracy charge; (3) permitting the government to amend certain

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1 The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska, imposed a sentence of seven years imprisonment with a special three year parole term to follow. 21 U. S. C. § 841 (b) (1) (A).



dates in the indictment during the course of the trial; and (4) refusing to suppress a tape recording of a conversation appellant had in advance of trial. We affirm.

The evidence discloses that appellant Powell and Ike Conway made three trips from Omaha, Nebraska, to Los Angeles, California, for the purpose of securing heroin. In the spring of 1976, appellant Powell approached Ike Conway, a heroin dealer in Omaha, Nebraska, concerning the acquisition of heroin from Conway's source of supply. Conway advised appellant that he could get heroin in California for $1000 an ounce. Shortly thereafter appellant and Conway made their first trip from Omaha to Los Angeles via commercial airlines. Upon arrival Conway called his source of supply, Herman Clarence Douglas, and had Douglas meet them at their motel parking lot. Appellant produced $10,000 which was given to Douglas. The heroin was delivered to appellant who indicated to Conway that he was satisfied with the dope. Appellant and Conway returned to Omaha separately. The heroin obtained by appellant was thereafter sold by him in Omaha.

Approximately 30 days later appellant and Conway made their second trip to Los Angeles for the purpose of securing heroin. This time Conway rented a car at the Omaha airport and drove appellant to Des Moines, Iowa, where they took a commercial airlines flight to Los Angeles. Conway's explanation for the circuitous route was: "Well, we didn't want nobody to see us, we were both suspicious, messing with heroin, and we didn't want nobody to see us to go." Prior to leaving Des Moines appellant gave Conway part of the $20,000 he had brought

for the purpose of purchasing heroin. Upon their arrival in Los Angeles Conway again telephonically contacted his source of supply, Douglas. They met Douglas in the motel coffee shop and left in Douglas' car. While in the car appellant gave Conway the $20,000 and the address where he wanted the heroin delivered. Conway gave the money and address to Douglas. Appellant and Conway then returned to their motel where Conway received a telephone call from Douglas that "my package was on the way." A few minutes later appellant received a call and then advised Conway "I am going over and check it out and see it is okay." Appellant returned about 15 minutes later and advised Conway "that everything was okay." Appellant and Conway then returned separately to Omaha. Appellant brought the heroin back to Omaha and sold it.

In July appellant and Conway made the third trip to Los Angeles with $20,000 for the purpose of securing heroin. This time a friend of Conway's drove appellant and Conway to Lincoln, Nebraska. From Lincoln they flew to Los Angeles. Upon arrival at their motel Conway again contacted Douglas who came over to the motel. This time appellant and Douglas could not agree on a price. The $20,000 in cash was then deposited in a safety deposit box at a local bank. The deposit was actually made by Conway's sister on July 19, 1976. Appellant, however, filled out the application form for the deposit box which she signed. Thereafter, as before, appellant and Conway returned separately to Omaha. About a week later Conway talked to appellant in Omaha. Appellant said "he had got a better deal, * * * he bought a brick of dope for $36,000.00." Conway asked appellant for some of the heroin, but appellant said "he would have to talk



to his peoples" first. Conway never did receive any of the heroin from appellant and that ended their venture.

Appellant contends the evidence is insufficient to prove that appellant conspired to distribute heroin. The thrust of his argument is that evidence of two purchases of heroin from Douglas did not suffice to create a conspiracy between the buyer and seller. The difficulty with appellant's contention is that viewing the evidence most favorable to the government the record establishes much more than a simple buyer-seller transaction.

The gist of the offense of conspiracy is a combination or agreement to disobey, or to disregard, the law. It is a "collective criminal agreement—[a] partnership in crime." *Callanan v. United States,* 364 U. S. 587, 593 (1961). A conspiracy is rarely susceptible of proof by direct evidence but must be proved by circumstantial evidence. *Valentine v. United States,* 293 F. 2d 708, 710 (8th Cir. 1961), *cert. denied,* 369 U. S. 830 (1962).

Proof of an explicit agreement to distribute the drugs is not required. The nature of the sales in itself may be sufficient evidence to support a finding of conspiracy. In *Direct Sales Co. v. United States,* 319 U. S. 703 (1943), the Supreme Court held that the nature of the goods sold, morphine sulphate, a restricted commodity with inherent capacity for harm, plus the quantity and frequency of sales was sufficient from which to infer that the seller knew of and participated in promoting the buyer's intended illegal distribution thereof. *Compare United States v. Falcone,* 311 U. S. 205 (1940).

In this case the first trip resulted in the purchase of 10 ounces of heroin valued at $10,000; the second resulted

in the purchase of 20 ounces of heroin valued at $20,000; the third trip was initially unsuccessful but a purchase of $20,000 worth of heroin was contemplated. This court has approved the use of the amount and value of controlled substances as proper circumstantial evidence to infer an intent to distribute as distinguished from mere possession for personal use. *United States v. Blake,* 484 F. 2d 50, 58 (8th Cir. 1973), *cert. denied,* 417 U. S. 949 (1974); *United States v. Wilkerson,* 478 F. 2d 813 (8th Cir. 1973); *United States v. Echols,* 477 F. 2d 37 (8th Cir.), *cert. denied,* 414 U. S. 825 (1973). In addition to the volume of heroin purchased there is other direct evidence that appellant conspired with either or both Ike Conway and Douglas in procuring the heroin for distribution in Omaha, all as previously described in the facts surrounding the three trips to Los Angeles and returns to Omaha.[2]

Appellant further contends the court erred in permitting the government to amend the indictment to state the ending date of the conspiracy as the end of July 1976 in lieu of June 15, 1976, as initially set out in the indictment. We disagree. The issue arose when the government offered in evidence three exhibits which showed that the safety deposit box in which the $20,000 was deposited on the third trip to Los Angeles was opened and entered on July 19 and 26, 1976. The government advised the trial court that the materials provided to the appellant

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2 In connection with his evidentiary insufficiency contention appellant complains that the court failed to give two requested instructions and erred in giving another upon which no proof was offered. We are satisfied that the instructions when considered as a whole were adequate and submissible on the basis of the proof offered and received.



well in advance of trial referred to this incident many times. Appellant did not then claim surprise or prejudice. Neither does he now. We note in this connection that the indictment which was filed December 16, 1976, describes the incident complained of except for the proper date.

We have consistently held that a variance between the date in the indictment and the proof is not fatal if the proof shows that the acts charged were committed within the statute of limitations and prior to the return date of the indictment, as long as the date was not a material element of the crime charged and defendant is unable to point to any prejudice. *United States v. Reece,* 547 F. 2d 432, 434-35 (8th Cir. 1977); *United States v. Frazier,* 545 F. 2d 71, 73-74 (8th Cir. 1976), *cert. denied,* 97 S. Ct. 823 (1977); *United States v. Joyner,* 539 F. 2d 1162, 1164-65 (8th Cir.), *cert. denied,* 97 S. Ct. 499 (1976). We have applied the same principles when the trial court permitted the government to amend a clerical error as to the date of the crime. *Krana v. United States,* 546 F. 2d 785, 786 (8th Cir. 1976). This is consistent with Fed. R. Crim. P. 52 (a) which states "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *See Russell v. United States,* 369 U. S. 749, 762-64 (1962). We conclude that the trial court did not err in permitting the government to amend the termination date of the conspiracy set out in the indictment.

Appellant's final claim of error arises out of the trial court's pretrial denial of a motion to suppress a government arranged tape recording of a conversation between Conway and appellant. The taped conversation took place after Conway's testimony before the grand jury. Appellant's indictment was filed a week thereafter. The

prosecutor in his opening statement referred to the recorded conversation between Conway and appellant and said that the jurors would be able to listen to the tape, confirming Conway's testimony. When the tape recording was offered in evidence during the course of the trial the court changed its ruling and refused its admission. Upon the request of appellant the court promptly admonished the jury to disregard any prior mention of any tape recording or any statements of counsel with reference to it.

We are satisfied that any prejudice arising from counsel's limited mention of the tape recording in his opening statement was removed by the court's prompt admonition to the jury when the government's offer was made. We note further that no motion for mistrial was made.

Upon consideration of the entire record we are satisfied that appellant received a fair trial and his conviction should be affirmed.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS
EIGHTH CIRCUIT.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

77-1453 September Term, 1977

UNITED STATES,
*Appellee,*

vs.

LARRY POWELL,
*Appellant.*

Appeal from the United States District Court
for the District of Nebraska

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied

November 18, 1977

Supreme Court, U. S.
FILED
FEB 18 1978
MICHAEL RODAK, JR., CLERK

No. 77-865

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OCTOBER TERM, 1977

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LARRY POWELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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WADE H. MCCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

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LARRY POWELL, PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the evidence at trial was insufficient to establish a conspiracy to distribute a controlled substance.

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of one count of conspiracy to distribute a controlled substance, in violation of 21 U.S.C. 846. He was sentenced to a term of seven years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. 1-7).

1. The government's evidence, which is undisputed, is summarized in the opinion of the court of appeals (Pet. App. 2-4). Ike Conway, an unindicted co-conspirator,[1]

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[1]Conway negotiated a plea agreement prior to trial (Tr. 139).

testified that he had contacted petitioner in the spring of 1976 and informed him that his source for heroin in Los Angeles would sell the drug at $1,000 an ounce. Shortly thereafter, petitioner and Conway flew separately from Omaha to Los Angeles, where they checked into the Airport Inn and contacted Conway's source of supply, one Herman Douglas (Tr. 56). Petitioner and Conway purchased $10,000 worth of heroin from Douglas in the parking lot of the motel; petitioner then returned to Omaha and sold the drugs (Pet. App. 2). Conway returned several days later.

About a month later, petitioner and Conway flew together from Des Moines, Iowa, to Los Angeles. They again checked into the Airport Inn and arranged to purchase $20,000 worth of heroin from Douglas (Tr. 69-79). After the purchase, petitioner returned alone to Omaha and sold the drugs (Pet. App. 3).

In July of 1976, petitioner and Conway flew a third time to Los Angeles, this time from Lincoln, Nebraska (Tr. 81-82).[2] They checked into a different motel and contacted Douglas. Petitioner negotiated with Douglas for several days regarding purchase of half a "brick" of uncut heroin for $20,000, but Douglas refused to sell at that price (Tr. 83-84). Petitioner returned to Omaha alone and spoke to Conway a week later, informing him that he had obtained a better deal and had bought a full "brick" for $36,000 (Tr. 108).

2. Petitioner contends (Pet. 7-9) that the evidence was insufficient to establish a conspiracy to distribute the heroin because there was no direct proof that the seller

[2]Conway explained that they traveled to Los Angeles from cities other than Omaha because they were suspicious and did not want to be observed (Tr. 67).



(Douglas) had knowledge that the buyer (petitioner) intended to distribute the drugs. But it is well-established that proof of an explicit agreement is unnecessary to prove a conspiracy between the buyer and seller of drugs, where there is an abundance of circumstantial evidence involving multiple sales of a large quantity of the drugs. *Direct Sales Co.* v. *United States,* 319 U.S. 703. As the court of appeals correctly noted (Pet. App. 4), "[a] conspiracy is rarely susceptible of proof by direct evidence but must be proved by circumstantial evidence. *Valentine v. United States*, 293 F. 2d 708, 710 (8th Cir. 1961), *cert. denied,* 369 U.S. 830 (1962)." See *Diaz-Rosendo* v. *United States,* 357 F. 2d 124, 129 (C.A. 9) (*en banc),* certiorari denied, 385 U.S. 856.

The undisputed evidence, viewed in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, 80, sufficiently established the existence of a conspiracy between petitioner, Conway and Douglas. Petitioner and Conway traveled three times to California to purchase heroin from the supplier Douglas, and petitioner twice brought back heroin for sale. The careful arrangements show that each participant had an essential role to perform in order for petitioner to acquire, transport, and sell the drugs, and that these roles were carried out in each instance. Moreover, the jury could infer from Conway's testimony and from the vast quantity of drugs sold to petitioner in a short period of time[3] that Douglas must have known that the drugs would be distributed (see *United States* v. *Steinberg*, 525 F. 2d

[3]The court of appeals noted that the amount and value of the drugs is proper circumstantial evidence from which the jury may infer an intent to distribute as opposed to possession for personal use (Pet. App. 5). See *United States* v. *Blake,* 484 F. 2d 50, 58 (C.A. 8), certiorari denied, 417 U.S. 949.

1126, 1133 (C.A. 2)) and "knew of and participated in promoting the buyer's intended illegal distribution" (Pet. App. 4). Indeed, successful resale of a large quantity of drugs would seem to be the *sine qua non* of a continuing profitable relationship between the wholesale seller and purchaser. Further review of this essentially factual issue is therefore not warranted.[4]

3. Contrary to petitioner's contention (Pet. 7), the trial court did not err in refusing to instruct the jury that a conspiracy is "an agreement between two or more persons to accomplish together a criminal or unlawful act." The court correctly defined conspiracy in its charge (Pet. 5-6), which was identical to the standard conspiracy instruction See Devitt and Blackmar, *Federal Jury Practice and Instructions*, §27.04 (1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
*Solicitor General.*

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[4]Petitioner's contention (Pet. 10-14) that this case conflicts with other cases from the Second, Fifth, Seventh and Ninth Circuits is groundless. In each of those cases, the evidence disclosed, at most, a simple buyer-seller relationship. There was no evidence of a continuing course of conduct by which the jury could reasonably infer that a conspiratorial agreement had been reached. *United States* v. *Spanos*, 462 F. 2d 1012 (C.A. 9); *United States* v. *Koch*, 113 F. 2d 982 (C.A. 2); *United States* v. *Ford*, 324 F. 2d 950 (C.A. 7). Here, there was an abundance of evidence that petitioner and Douglas were conspiring on several occasions within a short period of time to distribute a controlled substance illegally, and the court of appeals correctly concluded (Pet. App. 4) that "the record establishes much more than a simple buyer-seller transaction."

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